LIBRARY
SUPREME COURT, U. S.
FILED
FEB 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1351

INTERBORO CONTRACTORS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH NURNBERG
Attorney for Petitioner
535 Fifth Avenue
New York, New York 10017
212-986-6944

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
I. In being denied pre-trial discovery, petitioner was deprived of a fair hearing upon the backpay specifications	8
II. Petitioner was deprived of a fair hearing by being denied an adjournment by the trial examiner	16
Conclusion	16
Appendix:	
Judgment of the United States Court of Appeals	1a
Opinion of the Court of Appeals	3a
Board's Supplemental Decision and Order	16a
Trial Examiner's Supplemental Decision	19a
Backpay Specification and Notice of Hearing	30a

CITATIONS

PAGE

Cases:

Communist Party v. Subversive Activities Control Board, 254 F. 2d 314 (1958) 12

FMC v. Anglo-American Shipping Co., 335 F. 2d 255, 261, n. 9 8

Goldberg v. Kelly, 397 U. S. 254, 269 (1970) 9

Grannis v. Ordean, 234 U. S. 388, 394 (1924) 9

Greene v. McElroy, 360 U. S. 474, 496-497 (1958) 9–10

Hickman v. Taylor, 329 U. S. 495, 507 (1947) 13

Jencks v. U. S., 353 U. S. 657 (1956) 10, 12

Morgan v. U. S., 304 U. S. 221 (1937) 9

NLRB v. Adhesive Products, 258 F. 2d 403 12

NLRB v. American Federation of Television and Radio Artists, 285 F. 2d 902 12

NLRB v. Interboro Contractors, Inc., 2nd Cir., 388 F. 2d 495 (1967) 5

NLRB v. Miami Coca Cola Bottling Co., 403 F. 2d 994, 5th Cir. (1968) 7

NLRB v. Safway Steel Scaffold of Georgia, 383 F. 2d 273, 5th Cir. (1967), cert. den. 390 U. S. 955 7

NLRB v. Southern Materials Company, 345 F. 2d 240, 4th Cir. 1965) 7

Palermo v. U. S., 360 U. S. 343, 351 12

Shively v. Stewart, 421 P 2d 65 (1967) 15, 16

Starr v. Commissioner, 226 F. 2d 721, 722 (7th Cir.), cert. den. 350 U. S. 993 (1955) 13

U. S. v. Procter & Gamble Co., 355 U. S. 677, 682 (1958) 9

Universal Camera Corp. v. NLRB, 340 U. S. 474, 497 13

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

PAGE

Constitution of the United States:

Fifth Amendment 2

Statutes:

Administrative Procedures Act, Section 9
Title 5 U.S.C. 556 (c) (4) 4, 15

Title 5 U.S.C. 559 ..... 4, 15

Rules:

Board Rule 102.30 3

Board Rule 102.118 3

Rules of Federal Communications Commission, 47 C.F.R. §1.311-1.325 (1970) 8

MISCELLANEOUS MATERIALS

Berger, "Discovery in Administrative Proceedings", 12 Adm. Law Rev. 28 (1959) 14

Cox, Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings, 12 Adm. Law Rev. 51, 55 11

Davis, Administrative Law Treatise, Vol. 1, §8.03, p. 502 12

Davis, Administrative Law Treatise, p. 589 (1958) 10

Governor Rockefeller's Message, etc. cited in 3 Weinstein-Korn-Miller, N.Y. Civil Practice, §3103.03, p. 3110 8

Kaufman, "Have Administrative Agencies Kept Pace, etc.", 12 Adm. Law Bull. 115 10

PAGE

Kintner, "Discovery in Administrative Adjudicative Procedures", 16 Adm. Law Rev. 233 (1963) 8, 14, 16

Rauland, "Discovery Before Trial", Ch. I (1932) 5

Reich, "The New Property", 75 Yale Law Journal 733 14

Rowe, "The Role of Discovery in Federal Trade Commission Hearings", 21 Adm. Law Rev. 439 .....11, 14

Sunderland, "The Theory and Practice of Pre-Trial Disclosure", 36 Mich. Law Rev. 215, 216 5

IN THE

Supreme Court of the United States

October Term, 1970

No. .....

INTERBORO CONTRACTORS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit filed on November 23, 1970, granting respondent's application for enforcement of its supplemental decision and order directing petitioner to pay certain sums as a back pay award to two employees who were wrongfully discharged.

Opinions Below

The Opinion of the Court of Appeals is reported at 432 F.2d 854 and appears in the Appendix *infra,* pp. 3a-15a. The supplemental decision of the National Labor Relations Board appears in the Appendix *infra,* pp. 16a-29a.

Jurisdiction

The judgment of the Court of Appeals was filed on November 23, 1970 and appears in the Appendix *infra,* pp. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Was petitioner deprived of a fair hearing upon the back pay specifications in being denied the opportunity to take depositions of the two claimants prior to the hearing?

2. Was petitioner deprived of a fair hearing in being denied an adjournment in order to adequately and properly present its case?

Constitutional Provisions, Statutes and Rules Involved

This case involves the following constitutional provisions, statutes and rules:

1. Amendment V of the Constitution of the United States reads in part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *".

2. Board Rule 102.30 reads, in part, as follows:

"Sec. 102.30. *Examination of witnesses; depositions.* — Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of the section hereinafter referred to as the officer). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50."

3. Board Rule 102.118 reads, in part, as follows:

"Sec. 102.118 Same; *Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testifi-candum or subpoena duces tecum; prohibited from testifying in regard thereto.*—No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with

respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel."

4. Section 9 (c) (4) of the Administrative Procedures Act (5 U. S. C. 556 [c] [4]) reads, in pertinent part, as follows:

"(c) Subject to the published rules of the agency and within its powers, employees presiding at hearings may— * * * ¶ (4) take depositions or have depositions taken when the ends of justice would be served, * * *".

5. Section 9 of the Administrative Procedures Act (5 U. S. C. 559) reads, in part, as follows:

"559. Effect on other laws; effect on subsequent statutes ¶ * * * except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons * * *."

Statement of the Case

Respondent instituted this proceeding in the Court of Appeals for the Second Circuit to enforce its supplemental decision and order directing petitioner to pay substantial sums as a back pay award to two employees who were wrongfully discharged.

The Regional Director conducted an "exhaustive investigation * * * to ascertain all the facts necessary to prepare the specifications * * *" (App. pp. 24a-25a) between

December 22, 1967, when the Court of Appeals determined that the two employees had been discriminatorily discharged (*NLRB* v. *Interboro Contractors, Inc.*, 388 F. 2d 495, 1967) and July 18, 1968, when the Board issued its back pay specifications (App. p. 30a) and notice of hearing. In the course of this investigation, the respondent's Compliance Officer called the claimants to his office to ascertain efforts they made to obtain employment following their discharge.

Following this interview, the specifications were prepared but contained no information whatever of the names and addresses of prospective employers to whom the claimants applied unsuccessfully for employment, nor any allegation that claimants diligently sought re-employment during the back pay period in order to minimize their losses.[1, 2]

Thus confronted with respondent's specifications in July 1968, and without knowledge of the facts relied upon

1. The court found, however, "All the evidence which the company claims was unforeseen was available to the company counsel before the hearing" because such evidence "could have been discovered by the company's counsel if he had used the subpoenas which he requested and received". This finding is not supported by the record. The use of the subpoenas would have produced records at the hearing, and not before, to verify employment and earnings during the interim period but even then they would not disclose any information bearing on the efforts made by the discharged employees to find interim employment which was crucial on the question of the amount of back pay.

2. The Board's case could not, as the court below held, be deemed disclosed by the specifications. "The great weaknesses of pleadings as a means for developing and presenting issues of fact for trial lays in its total lack of any means for testing the factual basis for the pleader's allegations and denials." (Sunderland, "The Theory And Practice of Pre-Trial Procedure", 36 Mich. Law Rev. 215, 216. See also Rauland, Discovery Before Trial (1932) Ch. I).

by the Board to establish (a) the last day of the back pay period, (b) that claimant John Landers was replaced by McSpedon and that claimant William Landers was replaced by Carmichael, and (c) that both claimants had diligently sought interim employment in order to minimize their damages,[3] petitioner promptly moved the Regional Director and later the Trial Examiner under Board Rule 102.30, to take the deposition of the claimants. The Regional Director twice denied petitioner's application and the trial examiner also denied it despite petitioner's repeated assertion that the requested depositions were necessary to enable it to prepare for the prospective hearings and that if the depositions were denied, petitioner would be forced to participate in the hearing at considerable prejudice and disadvantage to itself (App. pp. 6a-7a).

At the outset of the hearing and again during respondent's case, petitioner applied for an adjournment so it would have an opportunity to adequately prepare. The trial examiner denied this application. After respondent rested, petitioner again moved for an adjournment on the ground that having heard respondent's witnesses and having seen its Exhibits for the first time, it was unprepared to meet the issues and proceed with its case. Peti-

3. None of the information in "(a)", "(b)" and "(c)" above was available to petitioner despite the Court of Appeals finding to the contrary (App. p. 15a). Petitioner had no way of ascertaining what facts the Board possessed to prove the concluding date of the back pay period. Petitioner had no way of knowing what facts the Board would rely upon to prove that a particular employee was the replacement for a discharged employee. Furthermore, petitioner had no knowledge of the evidence that the Board would present to prove efforts made by the discharged employees and their diligence in securing employment since it had no pre-trial opportunity for depositions.

tioner's motion was denied and the hearings concluded without the submission of petitioner's case.

Thereafter, the trial examiner issued a supplemental decision in which he held the petitioner liable for the amounts of back pay, as modified, and petitioner filed Exceptions to the trial examiner's report. On April 29, 1970, the Board affirmed the trial examiner's report and issued its supplemental decision and order. The Court of Appeals granted enforcement in open court on September 24, 1970, and in an Opinion printed October 19, 1970 held that in a proceeding before the board a party is not entitled to discovery procedures provided by Federal Rules of Civil Procedure; that Board Rule 102.30 was never intended for the taking of depositions solely for discovery purposes when the witnesses were available for trial; that the trial examiner did not abuse his discretion in denying petitioner an adjournment; and that the board's decision was supported by substantial evidence. As to the question of entitlement to depositions, the Court of Appeals expressly disagreed with the contrary position taken by the Fifth Circuit (*NLRB* v. *Safway Steel Scaffold of Georgia,* 383 F. 2d 273, 1967, *cert. den.* 390 U. S. 955; *NLRB* v. *Miami Coca Cola Bottling Co.,* 403 F. 2d 994, 1968). The opinion of the Second Circuit also conflicts with the dictum of the Fourth Circuit in *NLRB* v. *Southern Materials Company,* 345 F. 2d 240, 1965.

REASONS FOR GRANTING THE WRIT

I

In being denied pre-trial discovery, petitioner was deprived of a fair hearing upon the back pay specifications.

No good reason exists under modern enlightened practice to preclude a party to a board proceeding from taking pre-trial depositions. Complete pre-trial disclosure is required to place litigants on an equal footing at the outset of a board hearing. Only when board litigants are on a knowledgeable par, having benefited from complete pre-hearing disclosure, can the board properly administer the Act so that the public interest is best served.

Authorities, though widely disparate geographically and philosophically, nevertheless are in agreement that "a just decision on the merits, expeditiously rendered, is best achieved when the 'sporting theory of justice' is laid to one side and well prepared counsel, each aware of each other's case, present their respective cases to the court". (Governor Rockefeller's message upon his approval of the New York Civil Practice Law and Rules, cited in 3 Weinstein-Korn-Miller, N.Y. Civil Practice, ¶3103.03, p. 3110; see also Recommendation No. 30 of the Administrative Conference's Final Report, 1962; Kintner, Discovery in Administrative Adjudicative Procedures, 16 Adm. Law Rev. 233 [1963]).[4]

4. Reference therein to the Federal Trade Commission's adoption of discovery in 1963 points up the Court of Appeals' erroneous conclusion that it's "* * * research disclosed no Federal agency which gives litigants the right to pre-hearing discovery proceedings before it" (App. pp. 10a-11a); see also the rules of FCC (47 C.F.R. §1.311-1.325 [1970]); *FMC* v. *Anglo-American Shipping Co.*, 335 F. 2d 255, 261 n. 9 mentioning deposition rules adopted by Interstate Commerce Commission, Civil Aeronautics Board and Federal Power Commission.

Mr. Justice Douglas, in *U. S.* v. *Procter & Gamble Co.*, 355 U. S. 677, 682 (1958), stated that discovery with pretrial procedures "make a trial less a game of blind man's buff, and more a fair contest with the basic issues and facts disclosed to the fullest and practicable extent."

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan* v. *U. S.*, 304 U. S. 221 [1937]). The firmly embedded concept of a fair hearing "* * * contemplates full disclosure * * * for * * * secrecy generates suspicion and doubt". (*Garvey* v. *Freeman*, 10th Cir. 397 F. 2d 600 [1968]). Since the "fundamental requirement of due process of law is the opportunity to be heard (*Grannis* v. *Ordean*, 234 U. S. 388, 394 [1924]), it requires "* * * an opportunity to confront and cross-examine adverse witnesses" (*Goldberg* v. *Kelly*, 397 U.S. 254, 269 [1970]) which attains realistic dimension only when it is preceded by knowledge of the facts.

Thus, "The Government's case must be disclosed to the individual so that he has an opporunity to show that it is untrue" and "(w)hile this is important in a case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or, who in fact, might be persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy" and these "immutable principles" and "protections" have been extended "* * * in all types of cases where administrative and regulating actions were under scrutiny." (*Greene* v. *McElroy*, 360 U. S. 474, 496-497

[1958]). And because written statements of witnesses are as "every experienced trial Judge and trial lawyer knows" available "for impeaching purposes" and only "the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witnesses and thereby furthering the accused's defense", it has been held that the defense is entitled to see a witness' prior statement "to determine what use may be made of them. Justice requires no less" (*Jencks* v. *U. S.*, 353 U.S. 657 [1956]).

Legal literature abounds in expressions deploring the unwillingness of administrative agencies to adopt rules according litigants pre-trial discovery. Davis, in his Administrative Law Treatise (1958), states at page 589:

> "Probably no sound reason can be given for failure to extend to administrative adjudication the discovery procedures worked out for judicial proceedings."

Judge Kaufman, in "Have Administrative Agencies Kept Pace, etc." (12 Adm. Law Bull. 115), is of similar view and comments that the only explanation for this failure is that agencies treat all litigants as if they were Al Capone and should proceed instead from the premise that "the public value involved in prompt disposition of the majority of cases and in having and above board procedure far outweighs the value of concealment."

The absence of full discovery in administrative adjudicative proceedings leads to conditions antithetical to reason, order, practicability and common sense. Lack of discovery, it has been observed, "causes confusion, delay and an unwarranted expenditure of funds in administrative cases"

(Cox, Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings, *12 Adm. Law Rev. 51, 55*). "In litigation a party surprised is a party ill-prepared to defend himself" and "the element of surprise or gamesmanship, while it may have a place in the movie or television portrayal of trials, has absolutely no place in American jurisprudence and, if you will, in administrative proceedings." (Nicholson, *Discovery Is Not A Game,* 21 Adm. Law Bull. 441). With the adoption by the Federal Trade Commission of rules for pre-trial discovery, order and rationality were restored to their proceedings.

> "A new era dawned in the 1960s when the Commission adopted a thorough revision of its rules of practice * * * that procedural requirements also enshrined the concept of pre-trial discovery in Commission proceedings. For, understandably, no respondent could be expected to present his defense until he knew the evidence he must meet, which was largely in the possession of Commission counsel who had previously investigated the transaction at bar. Subsequent revision and rulings by the Federal Trade Commission have broadened and refined this discovery concept to the point where the Commission now uses pre-trial disclosure between the parties as a two way street." (Rowe, The Role of Discovery in Federal Trade Commission Hearings, 21 Adm. Law Rev. 439).

In this plethora of precedents and legal commentaries advocating the adoption of pre-trial discovery by administrative agencies, the question properly posed is whether respondent had a fair hearing after being denied pre-trial discovery and not, as the Court below dealt with the subject,

whether the Board was under an obligation to adopt pre-trial discovery procedures.

Courts are not without power to direct administrative agencies to adopt such procedures in the absence of specific statutory authority. In *Palermo* v. *U.S.*, 360 U.S. 343, 351, this court stated that in the *Jencks* case, it exercised "full power in the absence of statutory provisions to prescribe procedures for the administration of justice in the Federal Courts" (p. 395). Later, the federal courts followed and held that the *Jencks* rule applied to federal administrative agencies, including the Board (*Communist Party* v. *Subversive Activities Control Board,* 254 F.2d 314 (1958); *NLRB* v. *Adhesive Products,* 258 F.2d 403; *NLRB* v. *American Federation of Television and Radio Artists,* 285 F.2d 902).

While the courts claim not to be the architects of administrative procedures, "the practice is not altogether in accord with the theory. The courts avowedly have the responsibility for enforcing constitutional and statutory requirements, including the interpretation and application of the constitutional concept of due process and the statutory concept of 'hearing' or 'fair hearing', or 'full hearing' * * *. Even when the courts carefully limit their own rule of prescribing the minimum of procedural safeguards, administrative practices commonly coincide with the judicially-prescribed minima. To this extent—a rather substantive extent—the courts are the moulders of administrative procedure, whatever the ideals may be." (1 Davis, Administrative Treatise, ¶8.03, page 502). The obvious identity between "fair hearing", "due process" and "administrative procedures" provides the source of judicial power to

supply a procedural device in order to assume a hearing conforming with constitutional requirements. This was emphasized by this court in *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 497, where it was held:

> "The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is towards a rational inquiry into truth, in which the tribunal considers everything logically probative of some matter requiring to be proved. * * * Machinery for discovery of evidence has been strengthened; the boundaries for judicial notice have been slowly but perceptibly enlarged".

Since judicial power exists to fashion a procedural device in order to assure a fair hearing, the court below erred in limiting its inquiry, namely, whether the board was obliged to adopt pre-trial discovery in the absence of statutory authorization. Instead, the court should have considered the broader issue, whether the denial to petitioner of pre-trial depositions for discovery purposes deprived it of a fair hearing.[5] By its failure to make these inquiries, the lower court ignored the standard set down by this court when it stated: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation" (*Hickman* v. *Taylor,* 329 U. S. 495, 507 [1947]).

---

5. Reliance by the court below on *Starr* v. *Commissioner,* 226 F. 2d 721, 722 (7th Cir., 1955), *cert. den.* 350 U.S. 993 (1955) is misplaced. That case is distinguishable on its facts since there, unlike in the present case, the witnesses did not testify at the trial. In addition, while the court there held that entitlement to depositions is not per se a constitutional right, we argue here that by being denied pre-trial discovery within the present factual context, petitioner was deprived a fair hearing.

The application of the criteria above discussed to administrative hearings becomes increasingly compelling because of the concentrated power in administrative agencies (Berger, Discovery in Administrative Proceedings, 12 Adm. Law Rev. 28 [1959]) who hold fatal decisional power over the destinies of those subject to its authority (Reich, The New Property, 75 Yale Law Journal 733). This was probably recognized by the Federal Trade Commission when it changed its rules so as to provide for pre-trial discovery. Under its former practice, the Commission conducted hearings at intervals and neither commission counsel, nor respondent's, nor the hearing examiner, knew the evidence until after the hearing commenced. In "this atmosphere, the act of ambush and surprise was a premium" (Rowe, The Role of Discovery in Federal Trade Commission Hearings, 21 Adm. Law Rev. 439). Respondents in Commission hearings were told that pre-trial depositions were not necessary since during the intervals there was adequate opportunity to evaluate the evidence previously introduced and prepare rebuttal. Upon abandoning interval hearings and adopting consecutive hearings, the Federal Trade Commission adopted discovery procedures, thereby according a party the opportunity to gain advance knowledge of the evidence to be presented against it so as to be prepared to meet it. (Kintner, Discovery in Administrative Proceedings, 16 Adm. Law Rev. 233 [1963]). Emerging from this segment of agency experience is the recognition that a litigant requires the opportunity of time to consider, evaluate and prepare rebuttal to evidence which would otherwise be heard or seen for the first time at the hearing. Short of this, he is deprived of a fair hearing.

Moreover, the enactment by Congress of Section 559 of the Administrative Procedures Act (5 U.S.C. 559) which provides in part that "requirements or privileges relating to evidence or procedures apply equally to agencies and persons" and Section 6(c) (4) which accords trial examiners the authority to order pretrial depositions (5 U.S.C. 556 [c] [4]), constitutes a clear Congressional declaration that litigants in administrative proceedings should have the same access to facts that agencies do and Board Rule 102.30 should not be construed to limit the application of this policy.

There is no requirement that a statute or rule authorize pre-trial discovery before an administrative agency can be compelled to adopt rules allowing such procedures (*Shively* v. *Stewart,* 421 P 2d 65, 1967). There, the petitioners were physicians under disciplinary proceedings, accused by the State Board of Medical Examiners of involvements in abortions. They moved to obtain depositions for discovery purposes of the women whose written statements served as the basis for the charges. The trial examiner denied the application and the lower court denied petitioners' applications for writs of mandamus. The Supreme Court of California reversed, holding that:

> "Statutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review * * *. We are committed to the wisdom of discovery by statute in civil cases * * * and by common law in criminal cases * * *. Since the agency is the accuser, a party to the proceedings, and ultimately makes a decision on the record, its concentration of function calls for procedural safeguards."

In *Shively, supra,* the court took into consideration that discovery is a procedural concept which the courts will fashion even in the absence of specific statutes. Had this rationale been applied by the court below, petitioner's right to a fair hearing would have been realized.

II

Petitioner was deprived of a fair hearing by being denied and adjournment by the trial examiner.

The need for an adjournment is recognized in the absence of the availability of pre-trial depositions in order to give a litigant an opportunity to study, consider and evaluate the evidence after seeing and hearing it at the trial for the first time and before the hearings resume. (Kintner, Discovery in Administrative Proceedings, 16 Adm. Law Rev. 233, 1963; *Shively* v. *Stewart,* 421 P 2d 65, 1967).[6] Accordingly, the trial examiner's denial to the petitioner of an adjournment was an abuse of discretion.

Conclusion

By reason of all of the foregoing, it is respectfully requested that the petition herein for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH NURNBERG
Attorney for Petitioner

---

6. See Footnote #1.

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 34556

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERBORO CONTRACTORS, INC.,

Respondent.

Before:

LUMBARD, Chief Judge, FEINBERG and ANDERSON, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent Interboro Contractors, Inc., its officers, agents, successors, and assigns on April 29, 1969. The Court heard argument of respective counsel on September 24, 1970, and has considered the briefs and transcript of record filed in this cause. On September 24, 1970. the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Interboro Contractors, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: November 23, 1970

A TRUE COPY
A. Daniel Fursaro
Clerk

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 51—September Term, 1970.

(Argued September 24, 1970 Decided September 24, 1970.)

Docket No. 34556

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERBORO CONTRACTORS, INC.,

Respondent.

Before:

LUMBARD, Chief Judge, ANDERSON and FEINBERG, Circuit Judges.

Application for enforcement of a supplemental decision and order of the National Labor Relations Board directing respondent to pay certain sums as a back-pay award to two employees who were wrongfully discharged. Order enforced.

CHARLES R. BOTH (Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; William F. Wachter and Avrum M. Goldberg, Attorneys, N.L.R.B., on the brief), *for petitioner.*

JOSEPH NURNBERG, New York, New York, *for respondent.*

LUMBARD, *Chief Judge*:

We grant, in open court, enforcement of the Supplemental Order of the National Labor Relations Board directing the respondent Interboro Contractors, Inc. to pay $8,183.00 and $8,292.00 respectively to John and William Landers who had been improperly discharged, as we held in *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). We file a written opinion in order to set forth our reasons for holding that parties in a proceeding before the Board and its examiner are not entitled to the full panoply of discovery procedures provided by the Federal Rules of Civil Procedure.

In its original proceeding (157 N.L.R.B. 1295), the Board found that the Company discharged employees John and William Landers for engaging in protected concerted activity, and that it thus violated section 8(a)(1) of the National Labor Relations Act. At the time of their discharge the Landers brothers were employed on a construction project on Tratman Avenue in the Bronx. On January 18, 1969, we entered an enforcement decree which directed the Company, *inter alia*, to make the Landers whole for any loss of pay they may have suffered as a result of the Company's unfair labor practices.

Thereafter, the Board instituted the present proceeding pursuant to section 102.52, et seq., of its Rules and Regulations, to determine the amount of back pay due the claimants. The Regional Director issued his Backpay Specification and Notice of Hearing on July 18, 1968. The specification alleged that John and William Landers were replaced by employees Thomas McSpedon and Leroy Carmichael respectively. It further alleged that the back-pay

period ran from April 15, 1965, the date of the discharge, to January 21, 1966, the last date on which McSpedon and Carmichael were employed on the Tratman Avenue project, and that the Landers' net back pay equalled the gross earnings of their replacements during the back-pay period less the interim earnings of the Landers.

The Backpay Specification and Notice of Hearing also stated that a hearing would be held before a trial examiner on August 5, 1968, for the purpose of litigating the allegations set forth in the Backpay Specification. The hearing was later rescheduled for August 21, and was held then and on August 22. At the hearing Company counsel objected to the proceedings on the ground that he had not been allowed to take pre-hearing depositions of the Landers. He also moved for an adjournment on the ground that he did not have adequate opportunity to prepare, but his motion was denied.

On appeal to this court, the Company contends that the Board's back-pay award is not supported by substantial evidence and that it did not receive a fair hearing because it should have been allowed to depose the Landers prior to the hearing and because the denial of an adjournment by the trial examiner was improper and prejudicial. It asks that enforcement be denied or, in the alternative, that a further hearing be held. We grant enforcement and hold that the record amply supports the Board's backpay award and that the denial of the Company's application to depose the Landers prior to hearing and the denial of the Company's motion for adjournment were proper.

About three weeks before the hearing, Company counsel requested and received five subpoenas,[1] but he never used any of them. About the same time, the Company filed with the Board's regional office on application to take depositions from the back-pay claimants upon eight items of information. The Regional Director denied this application on the ground that no good cause had been shown within the meaning of section 102.30 of the Board's rules.[2]

1. These subpoenas were:

(1) A subpoena addressed to the Unemployment Insurance Board of New York to produce all records relating to the Landers' application for unemployment insurance during the back-pay period;

(2) a subpoena addressed to the pension and welfare fund of the Union for the production of all records of contributions made on behalf of the Landers and of all benefits paid to the Landers during the back-pay period;

(3) a subpoena addressed to the Union for the production of all its records pertaining to the Landers;

(4) a subpoena ad testificandum addressed to Mrs. John Landers; and

(5) a subpoena ad testificandum addressed to Mrs. Williams Landers

2. Section 102.30 of the National Labor Relations Board, Rules and Regulations, Series 8, as amended, provides in pertinent part:

Examination of witnesses; depositions.—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions * * * shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board. * * * The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve on the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify. * * *

The Company renewed its application on August 2, and shortly thereafter the Regional Director reaffirmed his denial and advised the Company that "Insofar as your application may be deemed a motion for discovery that also must be denied inasmuch as the [Board's rules] do not provide for such proceedings." Prior to the back-pay hearing the Company moved pursuant to section 102.30 for leave to take depositions from the Landers for the purpose of discovery. The trial examiner denied this motion on the ground that section 102.30 does not provide for the taking of discovery depositions but authorizes the taking of depositions of witnesses who, in the examiner's words, "for some reason or other cannot appear at the hearing." The back-pay claimants were then called to testify by the General Counsel and were cross-examined extensively by the Company.

At the conclusion of cross-examination, the Company counsel moved for an adjournment for an indefinite period in order "to give us an opportunity to put our case in." The principal ground for his application was that, having heard the testimony of the Board's witnesses for the first time and having seen its exhibits for the first time at the hearing, he was unprepared to meet the issues. Upon denial of the adjournment, the back-pay hearings closed without submission of the Company's case.

Subsequently, on December 19, 1968, the trial examiner issued his Supplemental Decision, in which he determined that the Company was liable for the amount of back pay in the specification, as modified. The Company thereafter filed exceptions to the trial examiner's Supplemental Decision, and on April 29, 1969, the Board issued its Supplemental Decision and Order affirming its examiner. Ac-

cordingly, the Board ordered respondent to pay the named employees the amount of back pay determined by the trial examiner.

The Company's first claim is that there is no substantial evidence in the record to support the Board's conclusions (1) that the back-pay period terminated on January 21, 1966, (2) that McSpedon and Carmichael were the Landers' replacement, (3) that John Landers made reasonable efforts to obtain reemployment while he was out of work, or (4) that William Landers made such reasonable efforts to obtain reemployment. None of these claims has merit.

The Company's second claim is that it did not receive a fair hearing because it was not allowed to take depositions of the Landers. The Company applied for leave to take their depositions prior to the hearing, for the stated purpose of aiding counsel in the preparation of his case for trial. Both parties agree that the application amounted to a request for pre-hearing discovery. The Board contends that its Rule 102.30 permitting depositions for "good cause shown" means that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and that the Rule was never intended to provide for the taking of depositions solely for discovery purposes when the witnesses will be available for trial. We agree.

It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right. *Starr* v. *Commissioner,* 226 F.2d 721, 722 (7th Cir.), cert. denied 350 U.S. 993 (1955); *Miner* v. *Atlass,* 363 U.S. 641 (1960). In fact, until Rule

26 of the Federal Rules of Civil Procedure (FRCP) became effective in 1938, pre-trial discovery was not available in the federal courts. Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures. *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F.2d 744, 751 (9th Cir. 1951). Although section 6 of the Act does give the Board the necessary rule-making power to carry out the Act, the provision places the Board under no obligation to adopt particular pre-trial procedures. Indeed several cases arising under the Act have held that, although the Board may possess the necessary rule-making power, the circumstances under which discovery will be permitted is a matter committed to the Board's discretion. See *Electromec Design* v. *N.L.R.B.*, 409 F.2d 631, 635 (9th Cir. 1969); *N.L.R.B.* v. *Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir.), cert. denied 368 U.S. 823 (1961); *North American Rockwell Corp.* v. *N.L.R.B.*, 389 F.2d 866, 871-872 (10th Cir. 1968).

The predecessor of the present Board Rule 102.30 was adopted and became effective in 1935, three years before Rule 26 of the FRCP entitled litigants in federal courts to take depositions "for the purpose of discovery." That Board Rule was patterned after former Equity Rule 47, which Rule 26 of the FRCP superseded, and which permitted the taking of depositions "upon good and exceptional cause" for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery.[3] The

3. As the Historical Commentary to Rule 26, FRCP, indicates (at p. 291), "Equity Rule 47 authorized * * * taking depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being 'no depositions.' The purpose here was not discovery but obtaining proof" (quoting from 45 W. Va. L.Q. 5).

Board's Rule has not changed substantially; it did not then authorize, and has not since authorized the taking of depositions for discovery purposes. The Board has consistently upheld this interpretation and has construed the Rule as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial. See *Mastro Plastics Corp.*, 136 N.L.R.B. 1342, 1344, n. 7 (1962), enforced in relevant part, 354 F. 2d 170, cert. denied 384 U.S. 972 (1965); *Van Raalte, Inc.*, 69 N.L.R.B. 1326, 1327 (1946); *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 296, n. 8 (1960); *Plumbers and Steamfitters Union Local 100*, 128 N.L.R.B. 398, 400 n. 8, enforced 291 F.2d 927 (5th Cir. 1961); *Del E. Webb Constr. Co.*, 95 N.L.R.B. 377, n. 2. In short, Rule 102.30 does not on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pre-trial discovery.

The Board's policy, moreover, is a logical one. Indeed, other administrative agencies have the same policy. In *FMC* v. *Anglo-American Shipping Co.*, 335 F.2d 255 (9th Cir. 1964), the Ninth Circuit held that the Merchant Marine Act does not warrant, much less require, the adoption of pre-trial discovery procedures by the Federal Maritime Commission. The same result has been reached in proceedings in which pre-trial discovery has been sought before the Tax Court of the United States. See *Louisville Buildings Supply Co.* v. *Commissioner*, 294 F.2d 333, 339-342 (6th Cir. 1961). The Administrative Procedure Act contains no provision for pre-trial discovery in the administrative process, and our research discloses no federal

agency which gives litigants the right to pre-hearing discovery in proceedings before it.[4]

We are not persuaded by the contrary position taken by the Fifth Circuit. In *N.L.R.B.* v. *Safway Steel Scaffold Co. of Georgia,* 383 F.2d 273 (5th Cir.), cert. denied 390 U.S. 955 (1967), and *N.L.R.B.* v. *Miami Coca Cola Bottling Co.,* 403 F.2d 994 (5th Cir. 1968), it stated that Rule 102.30 does provide for pre-hearing discovery. This position, however, not only ignores the origins of the Rule, but rests on three untenable premises: first, that a 1947 amendment to section 10(b) of the Act requires the Board to provide for pre-hearing discovery where practicable; second, that a Committee on Revision of the Board's Rules and Regulations subsequently recommended that the Board's rules be revised to adopt a pre-hearing discovery procedure; and finally, that section 102.30 of the Board's rules was thereafter amended to incorporate the recommended change.

Section 10(b) of the Act provides that Board proceedings, where "practicable," shall be conducted in accordance with the "rules of evidence" applicable in the federal district courts. On its face this amendment regulates the

4. Nevertheless, we recognize that some authorities have taken the position that there should be pre-trial discovery in administrative proceedings. See Berger, Discovery in Administrative Proceedings, 12 Ad. L. Bull. 28 (1959); Berger, Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts, 46 A.B.A.J. 74 (1960); Kaufman, Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques against Delay?—A Judge's View, 12 Ad. L. Bull. 103, 115 (1959-60); Gallagher, Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings, 12 Ad. L. Bull. 44 (1959-60); and Cox, Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings, 12 Ad. L. Bull. 51, 55 (1959-60).

introduction of evidence at Board hearings, without imposing on the Board any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence. The legislative history of section 10(b) confirms this. Under the original Act, section 10(b) provided that "[i]n any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." This provision was heavily criticized on the ground that it allowed too much incompetent evidence to get into the record of Board hearings. It was solely to meet that criticism that section 10(b) was amended in 1947. See 93 Cong. Rec. 3529, I Legislative History of the Labor Management Relations Act, 1947, p. 697 (hereafter "Leg. Hist."); House Report No. 245, on H.R. 3020, 80th Cong. 1st Sess. pp. 5, 40-41, 43, I Leg. Hist. 296, 331-332, 334; House Conference Report No. 510, on H.R. 3020, p. 53, I Leg. Hist. 557; 93 Cong. Rec. 3529 (Remarks of Rep. Owens, I Leg. Hist. 697; 93 Cong. Rec. 7345) (Remarks of Rep. Lesinski, I Leg. Hist. 910).[5] Moreover the Board has held that the amended section 10(b) "clearly relates to the introduction of evidence before the Board, and not to pre-trial privilege accorded parties to judicial proceedings." *Del E. Webb Construction Co.*, 95 N.L.R.B. 377 n. 2 (1951).

Second, we believe that the Fifth Circuit erred when it indicated that discovery procedures were recommended by

5. For example, in commenting upon the change, Representative Hartley, one of the Act's sponsors, stated that the provision "changes the procedure as to *the introduction of evidence before the Board.* It must now be conducted in accordance with the 'rules of evidence applicable in the district courts * * *'" (emphasis supplied). 93 Cong. Rec. 3529, I Legislative History of the Labor Management Relations Act, 1947, p. 697.

the 1960 Committee on Revision. Although Board Member Jenkins, in a working memorandum dated January 1960 (45 LRRM 94, 101), urged that a discovery procedure be formulated and proposed by the Committee, this plainly was not done. The Committee's proposed modification of Rule 102.30 would have preserved the requirement that good cause be shown and would have provided for the taking of "testimony by deposition upon oral examination or written interrogatories *for use as evidence in the hearing*" (emphasis added), thus preserving the distinction, recognized in the Federal Rules and long applied in Board practice, between depositions taken "for the purpose of discovery" and those taken "for use as evidence in the action." Finally, we think that the Fifth Circuit was mistaken in its view that the Board's rules were modified to incorporate the changes recommended by the Committee on Revision. Rule 102.30 was first promulgated in its present form in 1942, and not a word of substance has been changed since.

Furthermore, even under the Fifth Circuit's interpretation of Rule 102.30, we would sustain the action of the trial examiner. That rule gives the Board the discretion to determine whether to allow the adversary litigant to take depositions. In both *Safway and Miami Coca Cola,* the court stated that whether depositions are permitted for discovery purposes in a particular case depends upon whether in the trial examiner's opinion good cause has been shown. Thus, even if we accepted the Fifth Circuit's position, we could not deny enforcement of the Board's order on the ground that the trial examiner denied the Company's application to take depositions, unless we found that such ruling constituted an abuse of discretion—

a condition which has been found to exist only if the denial "is demonstrated to clearly prejudice the appealing party." *Electromec Design* v. *N.L.R.B.*, 409 F.2d 631, 635 (9th Cir. 1969). See also *N.L.R.B.* v. *Leprino Cheese Co.*, 73 LRRM 2865 (10th Cir. decided March 31, 1970). As we indicate below, however, no such prejudice was shown here. Indeed, the Fifth Circuit decisions cited by the Company itself indicated that no prejudice was suffered in those cases because those from whom depositions were sought appeared as witnesses at the hearing and were thus made available to cross-examination by the party seeking discovery. See *N.L.R.B.* v. *Safway Scaffolds Co., of Georgia,* 383 F.2d 273, 277 (5th Cir. 1967); and *N.L.R.B.* v. *Miami Coca Cola Bottling Co.,* 403 F.2d 994, 996 (5th Cir. 1968). Similarly in this case, the Company's counsel had ample opportunity to cross-examine the Landers at the hearing about the matters on which he wanted to depose them.

The Company's third claim is that it was denied a fair hearing because the trial examiner denied its motion for an adjournment. Company counsel argues that since he was not allowed to take the Landers' depositions, he was confronted at the hearing *for the first time* with information concerning the Board's case and that therefore he was entitled to a reasonable adjournment to analyze the Board's findings and to prepare his case. It is clear that the granting or denial of a continuance is a matter within the trial examiner's discretion; but if there had been adduced at the hearing evidence which was crucial to the Company's case and which was unforeseen, that is, some information which Company counsel had no way of

learning beforehand, then denial of a suitable adjournment would have constituted an abuse of discretion. In the circumstances of this case, however, no such showing was made. All the evidence which the Company claims was unforeseen was available to the Company counsel before the hearing. Some of the data had been derived from the Company's own sources, some was described with sufficient specificity in the specifications to permit the Company to verify it, and the remainder could have been discovered by the Company counsel if he had used the subpoenas which he requested and received.

The respondent also claims that adjournment should have been granted because there were several witnesses whom he wished to produce and who were the only ones qualified to testify on the employment conditions at the time, but who were not available at the time of the hearing. But as the trial examiner stated, "respondent offered no explanation why application for a postponement of the hearing was not requested prior to the hearing because of the absence from the city of these witnesses on the scheduled hearing date, nor was any attempt made to take their depositions prior to the hearing if they could not be present on the day of the hearing." Thus the request for an adjournment was properly denied.

Order enforced.

Board's Supplemental Decision and Order

175 NLRB No. 107

D-1911
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 2-CA-10569-1
2-CA-10569-2

INTERBORO CONTRACTORS, INC.

and

JOHN LANDERS, An Individual
WILLIAM LANDERS, An Individual

On March 31, 1966, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding, *inter alia,* that the Respondent had unlawfully discharged employees John Landers and William Landers and directing the Respondent to make these employees whole for any loss of earnings resulting from the discrimination against them. On January 18, 1968, the United States Court of Appeals for the Second Circuit entered its

1. 157 NLRB 1295.

decree granting the Board's petition for enforcement of its Order.[2]

On July 18, 1968, the Regional Director for Region 2 issued a Backpay Specification and Notice of Hearing, and on August 2, 1968, the Respondent filed an answer. On August 21, 1968, pursuant to the above-mentioned Notice, a hearing was held before Trial Examiner David London for the purpose of determining the amount of backpay due to the claimants. Following the hearing, briefs were filed with the Trial Examiner by the General Counsel and the Respondent.

On December 19, 1968, the Trial Examiner issued his Supplemental Decision, attached hereto, in which he found that the claimants were entitled to specific amounts of backpay. Thereafter, the Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

---

2. 388 F.2d 495.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Interboro Contractors, Inc., New York, N.Y., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., April 29, 1969.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Trial Examiner's Supplemental Decision

TXD-750-68
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

Washington, D.C.

Cases Nos. 2-CA-10569-1
2-CA-10569-2

INTERBORO CONTRACTORS, INC.

and

JOHN LANDERS, An Individual
WILLIAM LANDERS, An Individual

Bertram T. Kupsinel, Esq.,
for the General Counsel.

Joseph Goldberg, Esq., of New York, N.Y.,
for Respondent.

Statement of the Case

DAVID LONDON, Trial Examiner: On January 31, 1966, the Board issued its Decision and Order herein (157 NLRB 1295), finding that on April 15, 1965, Interboro Contractors,

Inc. ("Respondent"), discharged its employees John Landers and William Landers ("the claimants"), thereby violating Section 8(a)(1) of the Act. By that Decision and Order, the Board ordered, *inter alia,* that Respondent make both men whole for any loss suffered by them as the result of said violation. On January 18, 1968, the Court of Appeals for the Second Circuit ordered enforcement of the Board's order (388 F. 2d 495).

A controversy having arisen over the amount of backpay due the two claimants under the terms of the Board's order and Court decree, the Board's Regional Director for the Second Region, on or about July 18, 1968, pursuant to Section 102.52 of the Board's Rules and Regulations, issued and caused to be served on Respondent detailed backpay specifications alleging the backpay due these men as required by the Board order and Court decree. In accordance with Section 102.53(a) of said Rules, the specifications served on Respondent "specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation as to gross backpay,[1] their interim earnings,[2] the expenses for each quarter, the net backpay due, and any other pertinent information."

For its Answer to said specifications, Respondent pleaded a mere general denial, a pleading in complete disregard of Section 102.54(b) of the Board's Rules which require Respondent to "specifically admit, deny, explain," or plead lack of knowledge, as to each allegation of the

1. The amount each discharged employee would have earned from Respondent had he not been discharged.

2. Earnings of the discharged employee at other employment during the backpay period, deductible from the amount of gross backpay.

specifications. In addition the section provides that "[a]s to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, *a general denial shall not suffice.* As to such matters, if the respondent disputes *either the accuracy of the figures in the specification or the premises on which they are based,* he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures." Section 102.54(c) of thhe Rules further provides that if Respondent's answer "fails to deny any allegation of the specification in the manner provided by paragraph (b) of this section and the failure to do so is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation."

A hearing on the specifications and answer herein was held before the undersigned duly designated Trial Examiner in New York, New York, on August 21-22, 1968, at which the General Counsel and Respondent appeared by counsel, and John Landers and William Landers appeared as witnesses. At the opening of the hearing, the General Counsel made a motion (a) to preclude Respondent from introducing any evidence pertaining to the specifications because of its failure to plead thereto specifically and in detail, and (b) to deem the specifications to be true without the taking of any evidence to support said specifications. Though said motion was not altogether without merit, I denied the motion and required the General Counsel to

present evidence to support the specifications. At the hearing that followed, all parties were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence. Respondent, however, *offered no evidence.* Briefs from the General Counsel and Respondent have been fully considered.

Upon my observation of the witnesses, the testimony and evidence in this Supplementary proceeding, and the entire record in the case, I make the following:

Findings and Conclusoins

The specifications establishing the backpay due the discharged employees herein are in accordance with the Board's Rules and Regulations aforementioned and utilize the formula traditionally applied by the Board and approved by the courts.[3] Thus, Julius Altman, the Board's Compliance Officer for the Second Region who prepared the specifications, testified that he determined the backpay period as running from April 15, 1965, the day the two men were discharged, and extending to January 21, 1966.

On the day of their discharge, the two men were employed as steamfitters on Respondent's Tratman Avenue project. From an examination of the diary of George Soebke, Respondent's superintendent on that job, and conversations with Kleinhans, Respondent's president, it was disclosed to Altman that January 21, 1966, was the last day on which regular steamfitters on the project had worked. To determine the gross backpay to which the two men are entitled, Altman ascertained, from an examination of Re-

3. *N.L.R.B.* v. *Mastro Plastics Corporation,* 354 F. 2d 170 (C.A. 2); *N.L.R.B.* v. *Local 138, International Union of Operating Engineers,* 380 F. 2d 244, 252 (C.A. 2).

spondent's records, the gross wages paid their replacements, Thomas McSpedon and Leroy Carmichael, during the backpay period.[4] Applying that computation, the specifications allege, and I find, that during that period, absent his unlawful discharge, John Landers' gross backpay would have been $10,287, and that of William Landers $9,710.90.

In arriving at the foregoing computation, contrary to the specifications, I have not included $1,480 "travel pay" paid to McSpedon, John Landers' replacement, or $484 paid to Carmichael, William Landers' replacement. There is no testimony that either of the Landers brothers was entitled to, or ever received, travel pay while employed by Respondent. Both the specifications and I, however, have included as gross wages due both Landers brothers an amount equal to vacation pay paid to McSpedon and Carmichael in the backpay period. It was undisputed that pursuant to the collective-bargaining agreement under which Respondent and the four men in question were operating, "the employer adds" six percent as vacation pay "in connection with each paycheck" received by its steamfitters. As previously noted, Respondent neither pleaded nor offered any testimony challenging the accuracy of any of the computations set out in the specifications.

The specification disclosed, and I find, that during the backpay period with which we are concerned John Landers was engaged on two jobs and that his gross interim earnings during that period aggregated $3,729. Contrary to the specifications, however, I have not, for the reason heretofore indicated, deducted therefrom the sum of $145 travel

4. Altman testified that Kleinhans informed him that "McSpedon and Carmichael performed the same duties as the Landers brothers."

expense incurred by him while engaged in that interim employment. Subtracting his gross interim earnings of $3,729 from $10,287, the gross backpay he would have earned but for his unlawful discharge, I find the net backpay due John Landers to be $6,558.

Turning now to the amount due William Landers, I find that had he not been unlawfully discharged by Respondent on April 15, 1965, his gross wages from that day until January 21, 1966, would have been $9,710.90, the gross wages paid Carmichael, his replacement. For the reason heretofore stated with respect to alleged travel pay to John Landers, I have similarly disallowed the sum of $484 paid to Carmichael and so specified for William Landers as "travel pay." For the same reason I have also reduced the total gross backpay specified for the third quarter of 1965 from $3,186 to $2,967.90.[5] It is because of these deductions that William Landers' gross backpay is found to be $9,710.90. During that period, he earned $2,221 from other employment. Subtracting his interim earnings from his gross backpay I find that the net backpay due William Landers to be the sum of $7,489.90.

Approximately half of Respondent's exhaustive brief is devoted to an attack upon the testimony of Altman, the Board's compliance officer who prepared the specifications, and the alleged "laxity, * * * total inadequacy * * * and negligent manner * * * of the investigation which preceded" the issuance of the specifications. I find no merit to any of these contentions. Instead, I find that the specifications were prepared following an exhaustive investigation and bona fide effort to ascertain all the facts necessary to pre-

5. See footnote 1 on Appendix B-1 of the specifications, General Counsel's Exhibit 1-C.

pare the specifications prescribed by the Board's Rules and Regulations.[6] In any event, I find and conclude that, except for the items of travel pay, the undisputed testimony sustains the specifications served on Respondent. It is on that *testimony* that the *net backpay* due to each man has been computed and found.

Considering first the computation concerning the gross backpay which the claimants would have earned but for Respondent's violation of the Act, that computation is based on Respondent's own payroll records and information provided by Respondent's president and the diary of Soebke, the superintendent of the job on which the two men and their replacements worked. If Respondent deemed that computation, including the backpay terminal date of January 21, 1966, to be incorrect, *it was incumbent upon it to so plead and specify* in its answer. *N.L.R.B.* v. *Local 138, International Union of Operating Engineers,* 380 F. 2d 244, 252 (C.A. 2). Not only did it fail to do so, but it also failed to call as witnesses Kleinhans, or Soebke, to challenge the information attributed to them and relied upon by Altman. Its failure to do so warrants the inference that, if adduced, their testimony would not be favorable to Respondent. *Interstate Circuit* v. *United States,* 306 U. S. 208, 225-226; *N.L.R.B.* v. *Remington Rand, Inc.,* 94 F. 2d 862, 871 (C.A. 2).

---

6. Though I have disallowed the travel pay included in the specifications, Altman testified that this item was included "partly * * * because McSpedon and Carmichael received travel pay * * * and partly because we are contending [the Landers brothers] had been promised travel pay as well as overtime." The testimony fails to establish such a promise.

With respect to interim earnings, Altman testified that early in 1968,[7] he called both claimants to his office and asked them what efforts they had made to obtain employment following their discharge. The specification on interim earnings which Altman prepared is based on information supplied by the claimants and sets forth, in detail, *the names and addresses of their interim employers,* the dates of that employment, and their interim earnings for each 3 months period. Altman verified all of this information with the named interim employers and with Social Security. Though Respondent was served with this specification *more than a month before the hearing,* it offered no testimony to dispute this specification.

Turning now to the efforts to find additional employment during the interim period which the claimants were required to make, John Landers testified that after his discharge by Respondent he visited his Union's headquarters at least once a week and left his name "in a ledger book" so that its 10 business agents could call him "if there was an opening for a job" with any of the 300 contractors on the Union's list of contractors. While searching employment, he visited a number of construction sites on the lower east side of Manhattan where he lived; he went to Nassau county where he found the employment with Nichols Engineering Co. listed in the specification and also sought employment at Mineola, Long Island, and at Fort Washington. During the entire period of his unemployment he contacted "at least 100" of the contractors on the Union's list of contractors. During that period, he lived with his wife and

7. The opinion of the Court of Appeals (388 F. 2d 495) enforcing the Board's backpay order was handed down on December 22, 1967.

three dependent children and it was during that period that his wife was engaged in outside employment for the first time since they were married in 1950.

William Landers, like his brother, also went to the Union hall at least once a week and left his name and number "on the board * * * for the different territories of the business agents." He also sought employment from a substantial number of specified contractors, in both mid-Manhattan and upper-Manhattan. In any event, the burden of showing a willful loss of earnings rests upon Respondent. *N.L.R.B.* v. *Heinrich Motors, Inc.,* F. 2d , (C.A. 2) November 4, 1968, and cases cited therein.

At the close of the General Counsel's case, Respondent moved for, and was denied, an adjournment of the hearing to enable it to present its defense. One of the grounds for that adjournment urged upon me was that Respondent was "not prepared to go forward to prove the records of the Unemployment Insurance Bureau." However, no reason was offered why it was not prepared to do so during the hearing. Next, it was urged that "there are several witnesses * * * who are not available at this time who will testify as to what the conditions were in this industry insofar as employment is concerned." When asked why these witnesses were not produced at the hearing, the only response was that they were not then in New York, and that there were no other "qualified people." When asked to state what efforts were made to produce the suggested witnesses, whose identity Respondent's counsel refused to disclose, he answered: "I told them that the hearing would be on so and so days and they said very simply that they would not be in New York." Respondent offered no ex-

planation why application for a postponement of the hearing was not requested prior to the hearing because of the absence from the city of these witnesses on the scheduled hearing date, nor was any attempt made to take their deposition prior to the hearing if they could not be present on the day of the hearing.

Also advanced as a ground for adjournment was the claim of Respondent's counsel that he was "not prepared for the testimony that [he] wanted to bring in concerning [the claimants'] appearances at the Union" as they testified, and that he "expected to subpena * * * their wives [to testify] what their economic circumstances were during the backpay period." With respect to the grounds for an adjournment, it was undisputed that about three weeks *before the hearing,* Respondent's counsel requested, and received from the Board's offices the five following subpenas for use by Respondent:

> 1. A *subpoena duces tecum* addressed to the Unemployment Insurance Board of the State of New York to produce all records, documents, correspondence and memoranda relating to the application by claimants John Landers and William Landers for unemployment insurance during the period commencing April 15, 1965, to and including January 21, 1966, including all records relating to job opportunities which were made available to the Charging Parties.
>
> 2. A *subpoena duces tecum* addressed to the Pension or Welfare fund of Local 638, United Association of Journeymen requiring the production of all records of contributions made on behalf of the claimants to any of its pension or welfare funds and records of all benefits paid to said claimants for the period commencing April 15, 1965 to and including January 21, 1966.

3. A *subpena* to Local 638 of United Association of Journeymen requiring the production of all its records pertaining to claimants John Landers and William Landers.

4. A *subpena ad testificandum* addressed to Mrs. John Landers.

5. A *subpena ad testificandum* addressed to Mrs. William Landers.

Though Respondent's counsel did not deny receiving these subpenas, he admitted that he had made no use of any of these subpenas.

Upon the basis of the foregoing findings and conclusions, I recommend that the Board issue the following:

ORDER

(a) Respondent shall pay to John Landers and William Landers, respectively, the sum of $6,558.00 and $7,489.90, less any witholding required by Federal, State or City laws, plus interest thereon at the rate of 6 percent per annum in accordance with the formula prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716, 720-721.

(b) Respondent shall notify the Regional Director for Region 2, in writing, within 20 days from date of this Supplemental Decision what steps Respondent has taken to comply herewith.[8]

Dated at Washington, D.C., Dec. 19, 1968.

David London
Trial Examiner

8. In the event this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director in writing within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Backpay Specification and Notice of Hearing

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SECOND REGION

Case No. 2-CA-10569-1—Case No. 2-CA-10569-2

INTERBORO CONTRACTORS, INC.

and

JOHN LANDERS, An Individual
WILLIAM LANDERS, An Individual

The National Labor Relations Board, herein called the Board, having on March 31, 1966, issued its Decision and Order directing Respondent Interboro Contractors, Inc. to make whole John Landers and William Landers, herein called the discriminatees, for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, and the United States Court of Appeals for the Second Circuit having on January 18, 1968 entered its Decree enforcing in full, *inter alia,* the backpay provisions of the Board's Order concerning the discriminatees, and a controversy having arisen over the amount of backpay due the discriminatees under the terms of the Board's Order and the Court's Decree,

the Regional Director of the National Labor Relations Board for the Second Region, pursuant to authority duly conferred upon him by the Board and by the Rules and Regulations of the Board, Series 8, as amended, Section 102.52, hereby issues this Backpay Specification and alleges that the backpay due the discriminatees under the Board's Order as enforced by the Court of Appeals for the Second Circuit is as follows:

I. *The Backpay Period*

The period during which the discriminatees suffered loss of pay as the result of the discrimination against them, herein called the backpay period, is from April 15, 1965, the date of the discharges, to January 21, 1966, the last date on which the employees hired to replace William Landers and John Landers were employed on the New York Telephone Project at Tratman Avenue, Bronx, New York, herein called the project.

II. *Measure of Gross Backpay*

(a) Prior to the backpay period the discriminatees were employed by Respondent on the Project as fulltime employees and were classified as steamfitters.

(b) In addition to their hourly rates the claimants received overtime, travel and vacation pay.

(c) During the backpay period John Landers and William Landers were replaced by employees Thomas McSpedon and Leroy Carmichael respectively, except as stated below in subparagraph (e). The gross total earnings for these replacements include, in addition to their basic pay, compensation pay for overtime work, travel and vacation.

(d) During the backpay period John Landers' gross pay would have been the gross total earnings earned by his replacement, McSpedon.

(e) William Landers' gross backpay for the backpay period would have been the gross total earnings earned by his replacement, Carmichael plus additional monies for the third quarter of 1965. Carmichael at his own choice was employed for ten (10) weeks rather than thirteen (13) weeks during this quarter. For the third quarter 1965, William Landers' gross backpay should be determined by multiplying Carmichael's gross average weekly earnings (including overtime and travel pay) by thirteen (13) weeks.

III. *Net Interim Earnings*

Net Interim Earnings of each discriminatee consisted of his gross earnings during the backpay period less expenses incurred in connection therewith, if any, computed on a calendar quarterly basis.

IV. *Net Backpay*

Net Backpay of each discriminatee is the difference between his gross backpay and net interim earnings, computed on a calendar quarterly basis.

V. *Computation of Net Backpay for the Discriminatees*

(a) Appendices A1 and B1 show for each discriminatee the computation of his gross backpay on a calendar quarterly basis in accordance with Section II above.

(b) Appendices A2 and B2 show for each discriminatee the interim earnings which it is admitted each discriminatee had, his expenses and net interim earnings on a calendar quarterly basis in accordance with Section III above.

(c) Appendices A3 and B3 show for each discriminatee the computation of his net backpay on a calendar quarterly basis in accordance with Section IV above.

VI. *Summary*

Summarizing the facts and computation set forth above and in the Appendices, the obligation of the Respondent to make whole the discriminatees pursuant to the Order and Decree will be discharged by payment to the discriminatees named below of the amounts set forth below opposite their respective names plus 6% interest on such sum, accrued to the date of payment pursuant to such Order and Decree, minus the tax withholding required by Federal, State and City laws.

John Landers	$8183
William Landers	$8292

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX A-1

Computation of Gross Backpay for John Landers Based on Earnings of Thomas McSpedon, His Replacement

Period	*Gross Wages*	*Travel Pay*	*Total*
1965			
2nd Quarter			
4-15 to 6-30	$2402	$544	$2946
3rd Quarter	3274	512	3786
4th Quarter	3759	296	4055
1966			
1st Quarter			
Week Ending 1-5 to 1-21	852	128	980
			11767
			3584
			$8183

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX A-2

Interim Earnings of John Landers

Period	*Name and Addres of Interim Employer*	*Interim Earnings*		
1965 2nd Quarter 4-15 to 6-30	Dierks Heating Company 4332—33rd Street Long Island City New York, 11101			$ 696
3rd Quarter	None			0
4th Quarter	Nichols Engineering Research Corporation 150 Williams Street New York, N.Y. (employed from week ending 11-4 to end of quarter)		$2574	
		less additional travel expense of $3.45 per day based on $2.70 daily round trip railroad fare to and from Long Beach, and 75¢ daily cab fare from railroad station to Project site (no public transportation available to site). 34 days @ $3.45	117	
		Net		2,457
1966 1st Quarter 1-1 to 1-12	Nichols Engineering Research Corporation		459	
		less additional travel expense of $3.45 per day based on $2.70 daily round trip railroad fare to and from Long Beach, and 75¢ daily cab fare from railroad station to Project site (no public transportation available to site). 8 days @ $3.45	28	
		Net		431
				$3,584

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX A-3

Computation of Net Backpay for John Landers

Period	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1965			
2nd Quarter	$2946	$696	$2250
3rd Quarter	3786		3786
4th Quarter	4055	2457	1598
1966			
1st Quarter to 1-21-66	980	431	549
		Total	$8183

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX B-1

Computation of Gross Backpay for William Landers Based on Earnings of Leroy Carmichael, His Replacement

Period	*Gross Wages*	*Travel Pay*	*Total*
1965			
2nd Quarter			
4-15 to 6-30	$2353	$268	$2621
3rd Quarter[1]			3186
4th Quarter	3538	152	3690
1966			
1st Quarter			
Week Ending 1-5 to 1-21	852	64	916
			10,413
			2221
			$8192

1. Carmichael worked ten (10) weeks during this quarter. His total gross wages were $2283, his travel pay was $168 and the total wages for these ten (10) weeks were $2451. The average weekly wage was $245.10. This average weekly wage multiplied by thirteen (13) is $3186.

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX B-2

Interim Earnings of William Landers

Period	*Name and Address of Interim Employer*	*Interim Earnings*		
1965 2nd Quarter 4-15 to 6-30	None			0
3rd Quarter	None			0
4th Quarter (week ending 11-24 to end of quarter)	Nichols Engineering Research Corporation 150 Williams Street New York, New York		$1949	
		less additional travel expense of $3.45 per day based on $2.70 daily round trip railroad fare to and from Long Beach, and 75¢ daily cab fare from railroad station to Project site (no public transportation available to site). 26 days @ $3.45	90	
		Net		$1859
1966 1st Quarter 1-1 to 1-15	Nichols Engineering Research Corporation		272	
		less additional travel expense of $3.45 per day based on $2.70 daily round trip railroad fare to and from Long Beach, and 75¢ daily cab fare from railroad station to Project site (no public transportation available to site). 3 days @ $3.45	10	
		Net		$ 262
				$2121

Re: Interboro Contractors, Inc.
Case Nos. 2-CA-10569-1; 10569-2

APPENDIX B-3

Computation of Net Backpay for William Landers

Period	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1965			
2nd Quarter	$2621		$2621
3rd Quarter	3186		3186
4th Quartrer	3690	1859	1831
1966			
1st Quarter to 1-21-66	916	262	654
		Total	$8292

Please take notice that on the 5th day of August 1968, at 11 a.m. at 745 Fifth Avenue, Fifth Floor, in the State and City of New York, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Backpay Specification, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondent shall within fifteen (15) days from the date of the Specification, file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to the Specification. To the extent that such Answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations and the failure so to do is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

Form NLRB 4688, Statement of Standard Procedures in Formal Hearings Held before the National Labor Relations Board is attached.

Dated at New York, New York this 18th day of July 1968.

IVAN C. MCLEOD

Ivan C. McLeod, Regional Director
National Labor Relations Board
745 Fifth Avenue
New York, New York 10022